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No. 95-595

IN THE
Supreme Court Of The United States
OCTOBER TERM, 1995

HILLER SYSTEMS INCORPORATED, *et al.*,
Petitioners,

v.

ISABELLA SERVIS, Administratrix
of the Estate of Peter Thomas Humphrey, *et al.*
Respondents.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF AMICI CURIAE MICHAEL G. MILLER AND SADIE R. RICHARDSON IN SUPPORT OF RESPONDENTS AND IN OPPOSITION TO PETITION FOR A WRIT OF *CERTIORARI*

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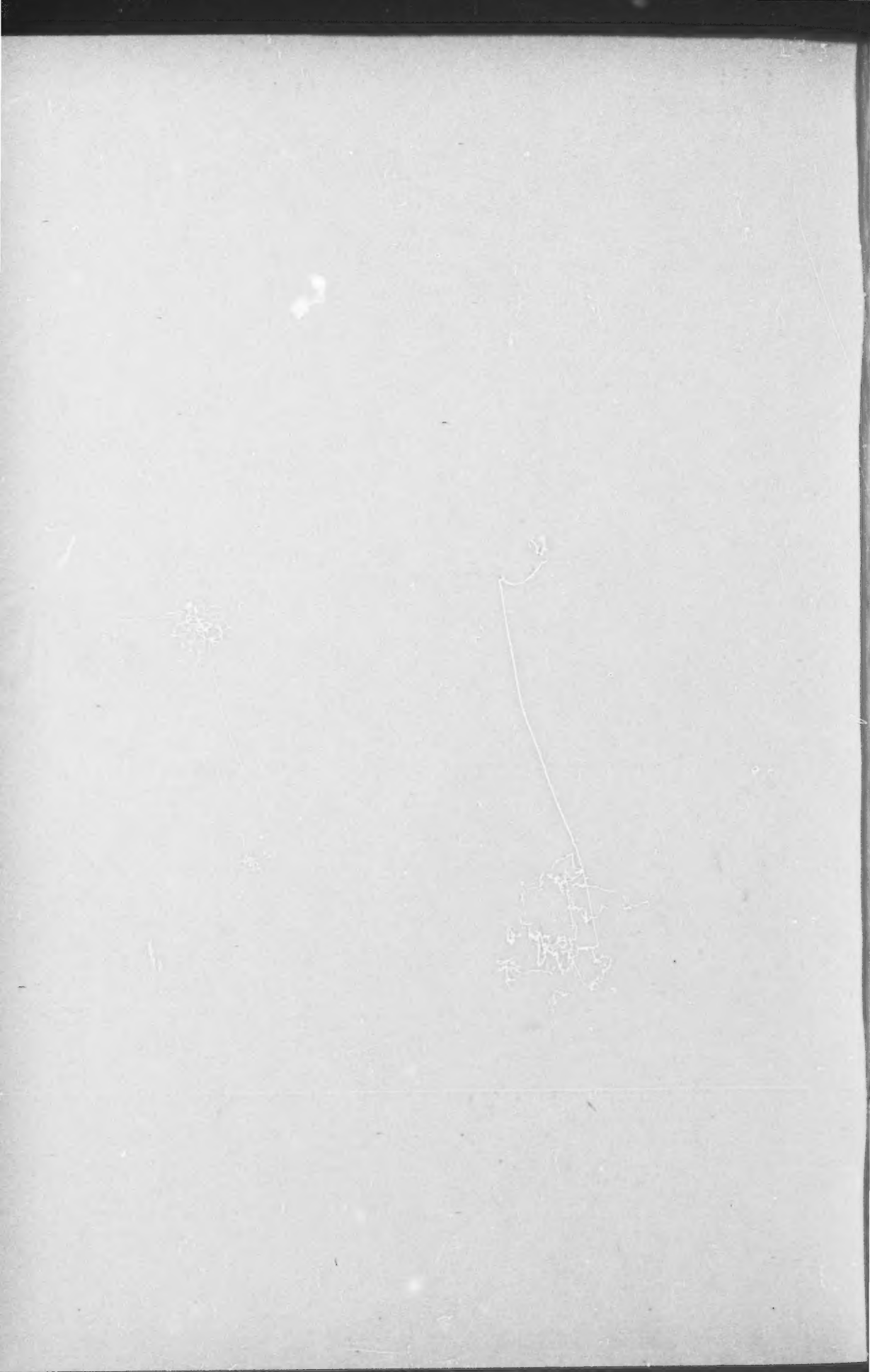

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Michael G. Miller ("Miller") and Sadie R. Richardson ("Richardson"), pursuant to Supreme Court Rule 37.2, hereby move for leave to file the attached brief as *amici curiae* in support of the respondents and in opposition to the Petition for a Writ of *Certiorari*. The respondents (Isabella Servis and the United States) have consented to the filing of this brief in opposition. The motion is necessitated by petitioners' refusal to consent to the filing of the brief.

INTEREST OF AMICI CURIAE AND REASONS WHY AMICUS BRIEF IS DESIRABLE

The present case is a wrongful death action under general maritime law. It arises out of a discharge of carbon dioxide ("CO_2") on board the M/V Cape Diamond while the vessel was berthed in navigable waters in Norfolk, Virginia. The CO_2 discharge killed two people — Peter Thomas Humphrey ("Humphrey") and Lieutenant Commander William B. Turek ("Turek").

Respondent Isabella Servis ("Servis") is administratrix of Humphrey's estate. *Amici* (Miller and Richardson) are executor and administratrix c.t.a., respectively, of Turek's estate. Miller and Richardson have filed a companion wrongful death action against the petitioners asserting, *inter alia*, the same causes of action as are alleged in the present case. In addition, Miller and Richardson were granted leave by the Fourth Circuit to act as *amici* before that Court in the present case.

The sole issue raised by the Petition for *Certiorari* is whether the petitioners (defendants below) are "agents" of the United States for purposes of the so-called "exclusivity clause" of §745 of the Suits in Admiralty Act (the "SAA"), 46 U.S.C. app. §741, *et seq*. If so, as petitioners contend, Servis' sole remedy is against the United States in federal court, and the petitioners are immune from suit under the SAA. If not, as the respondents argue and as the Fourth Circuit held, the present action may proceed against the petitioners because they are not protected by §745's exclusivity provision.

This very same issue has also been raised by petitioners in their defense of *amici's* own wrongful death lawsuit. Consideration of that issue in *amici's* suit has been stayed by consent Order pending this Court's disposition of the Petition for *Certiorari* in the present case. Accordingly, whatever ruling the Court issues in this case will directly impact *amici's* own lawsuit against petitioners.

In fact, *amici's* stake in resolving this issue in the present case is more compelling than is that of Humphrey's estate. This is because Turek's estate (unlike Humphrey's estate) is barred from suing the United States under the *Feres* doctrine.[1] *Feres v. United States*, 340 U.S. 135 (1950); *see also United States v. Johnson*, 481 U.S. 681 (1987) (widow of Coast Guard helicopter pilot barred by *Feres* from bringing wrongful death action against United States); *Hillier v. Southern Towing Co.*, 714 F.2d 714 (7th Cir. 1983) (widow and estate of Coast Guard Marine Safety Inspector barred from suing United States under the SAA). Accordingly, if, in addition to being barred from suing the United States by *Feres*, Turek's estate also cannot sue petitioners because petitioners are "agents" under the exclusivity clause, Turek's estate could potentially be without any remedy whatsoever for Turek's wrongful death, except perhaps for products liability claims.[2] In contrast, even if Humphrey's estate were prohibited from suing the petitioners because they were deemed to be "agents" of the government under §745, Humphrey's estate would still have a remedy against the United States because Humphrey's estate is *not* barred by the *Feres* doctrine from suing the government. Thus, the disposition of this case will have especially important consequences for the Turek estate.

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[1] At the time of his death, Turek was on active military duty as a United States Coast Guard Marine Safety Inspector. Humphrey was a non-military employee of a private, civilian employer.

[2] Turek's estate does have one argument available to it that is not available to Humphrey's estate. The exclusivity clause only operates "where a remedy is provided" against the government by the SAA. *See* SAA §745. It is Turek's estate's position that, if the *Feres* bar applies, no "remedy is provided" to the estate by the SAA against the United States and, accordingly, the exclusivity clause is inapplicable by its own terms.

Though *amici* have raised this argument in their lawsuit against petitioners, the resolution of this issue (as with all other issues in *amici's* case) is being stayed pending disposition of the Petition for *Certiorari* in the present case.

In sum, the very same issue involved in the present case has been raised by petitioners in *amici's* own wrongful death action. Moreover, if this issue is decided in petitioners' favor in the present case, that ruling could be dispositive of most, if not all, of *amici's* causes of action in *amici's* own lawsuit against petitioners. Accordingly, Miller and Richardson respectfully request leave to file the appended brief as *amici curiae*. Allowing *amici* to file this brief will provide the supplementary assistance to existing counsel and insure a complete and plenary presentation of the issues the *amicus* rules were designed to foster. It will also enable *amici* to protect Turek's estate's own interests in this litigation just as *amici* were permitted to do by the Fourth Circuit.

CONCLUSION

For the reasons stated above, Miller and Richardson hereby respectfully request that this Court grant leave to file the appended brief as *amici curiae* in opposition to the Petition for a Writ of *Certiorari* and in support of the position of respondents, Isabella Servis, administratrix of the estate of Peter Thomas Humphrey, and the United States of America.

Respectfully submitted,

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QUESTION PRESENTED

Whether the term "agent" of the United States, as used in §745 of the Suits in Admiralty Act, 46 U.S.C. app. §741, *et seq.*, grants immunity from suit to (and therefore makes the United States liable for the torts of) not only the general or operating agent of government vessels, but also all of such agent's contractors, subcontractors, sub-subcontractors, and others with whom the government has no privity of contract.

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BRIEF OF AMICI CURIAE MICHAEL G. MILLER AND SADIE R. RICHARDSON IN SUPPORT OF RESPONDENTS AND IN OPPOSITION TO PETITION FOR A WRIT OF *CERTIORARI*

IDENTITY OF *AMICI* AND *AMICI'S* INTEREST

Amici, Michael G. Miller ("Miller") and Sadie R. Richardson ("Richardson"), are executor and administratrix, c.t.a., respectively of the estate of William B. Turek ("Turek"). Turek died as a resuly of the same accident that killed the respondent Isabella Servis' decedent (Peter Thomas Humphrey). Miller and Richardson have filed a companion wrongful death action against petitioners in which petitioners have raised the same legal issue as they raise in the Petition for *Certoriari* in the present case.

STATEMENT OF THE CASE

A. *Factual Background*

As mentioned in the accompanying motion, this is a wrongful death action under general maritime law brought by the administratrix of the estate of Peter Thomas Humphrey ("Humphrey") against the petitioners. Humphrey's death occurred on the M/V Cape Diamond, a ship owned by the United States Maritime Administration ("MARAD"), an agency of the United States Department of Transportation. Because Humphrey was killed on a federal vessel, this case implicates the Suits in Admiralty Act (the "SAA"), 46 U.S.C. app. §741 *et seq.*[1]

The SAA creates an *in personam* cause of action against the United States whenever a person is injured or killed on a United States ship where, "if such vessel were privately owned or operated . . . a proceeding in admiralty could be maintained." 46 U.S.C. app. §742. Thus, the SAA waives the sovereign immunity of the United States for injuries on board federal vessels. However, the statute does not stop there. It also provides that the remedy granted against the government by the SAA is exclusive of any liability of the government's "agent or employee." Specifically, §745 states that the United States' liability is "exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim . . . ."

It is this so-called "exclusivity clause" that is at the center of this litigation. In particular, the sole issue in this case is whether the petitioners (defendants below) are "agents" of the United States for purposes of the exclusivity clause. If so, the

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[1] This case also involves the Public Vessels Act ("the PVA"), 46 U.S.C. app. §781, *et seq.*, because the ship in question was a "public vessel" as defined by that statute. However, suits under the PVA are subject to the SAA's "exclusivity clause" which is at the heart of this case. *See* §782 of the PVA which provides that suits under the PVA "shall be subject to and proceed in accordance with the provisions of [the SAA]. . . ."

present action cannot be maintained against them and Humphrey's estate's exclusive remedy is against the United States under the SAA. If, on the other hand, the petitioners are *not* "agents" of the United States under §745, then the present action is *not* governed by the exclusivity clause and this suit can proceed against the petitioners in the same manner as any other maritime wrongful death action.

At the time of Humphrey's death, the Cape Diamond was being operated for the government by a private shipping company, *viz.* Marine Transport Lines, Inc. ("MTL"). MARAD had retained MTL under a contract variously referred to as a "Ship Manager's Agreement" or "General Agency Agreement." Under that agreement, MTL was designated as the "Ship Manager" and "General Agent" for the Cape Diamond as well as for several other government vessels.

It is uncontested that MTL is an "agent" of the United States and thus immune from suit under the SAA. Consequently, MTL was not named as a defendant in this action.

By way of contrast, *none* of the petitioners (defendants below) was engaged at any time by MARAD or any other government department or agency. Further, nowhere in any documentation in the case record is any party other than MTL referred to as the government's "agent." Indeed, the United States has consistently maintained throughout this litigation, in quite emphatic terms, that the petitioners "are not now and never have been an agent of MARAD with respect to the Cape Diamond." Affidavit of Tim P. Roark, chief contracting officer of MARAD, at ¶6.

Far from being retained by the government as its agents, the petitioners were all hired as independent contractors either by the private ship's operator MTL, or by MTL's own contractors or subcontractors. Thus, petitioner Norfolk Shipbuilding and Drydock Corporation ("Norshipco") was engaged by MTL as general contractor to overhaul and make repairs to the Cape

Diamond. Petitioner Hiller Systems, Inc. ("Hiller") was subcontracted by both Norshipco and MTL to troubleshoot and repair the Cape Diamond's CO_2 system. Finally, petitioners Wayne Francis Muth, Edward Speary, and Jason B. Nuss (collectively, the "Hiller employees") were all employed by Hiller to work, in one capacity or another, on the ship's CO_2 system.

B. *Procedural Background*

The underlying lawsuit was originally filed in the Circuit Court for the City of Norfolk, Virginia. The petitioners removed the case to federal District Court on the basis that the petitioners were "agents" of the United States under §745 of the SAA and that, therefore, the plaintiff's exclusive remedy was against the United States in federal court. Norshipco then filed a third party action against the United States.

The District Court agreed that the petitioners were "agents" of the United States and thus immune from suit under the exclusivity clause. *Servis v. Hiller Systems, Inc.*, 858 F.Supp. 590 (E.D.Va. 1994). Accordingly, the District Court granted summary judgment in favor of the petitioners and dismissed the third party complaint against the government. *Id.*

In a unanimous opinion, the Fourth Circuit reversed. The Court held that none of the petitioners was an "agent" of the United States under the SAA. *Servis v. Hiller Systems, Inc.*, 54 F.3d 203 (4th Cir. 1995). The Court therefore remanded the case for further proceedings consistent with its opinion. *Id.*

Petitioners subsequently filed their Petition for a Writ of *Certiorari* in this Court.

SUMMARY OF ARGUMENT

There is no compelling reason for this Court to grant review in the present case. There is no conflict, let alone a conflict on an "important federal question", between the Fourth Circuit's opinion and any other federal appeals court, state court of last

resort, or decision of this Court. Indeed, the lower courts have barely even begun to address the application of §745 to subcontractors. Accordingly, this Court should allow considerably more sifting by the lower courts before it grants *certiorari* on this issue. This argument is addressed in Part I of this Brief.

In addition, review should be denied because the Fourth Circuit's opinion is correct on the merits. Both the language and legislative history of §745 confirm, in no uncertain terms, that the exclusivity clause was designed to protect only private ship's operators such as MTL who are general or operating agents of the United States and who are in direct contractual privity with the federal government. The opposite conclusion could also impose potentially vast liability on the federal treasury. These arguments are discussed in Part II below.

ARGUMENT

I

THERE IS NO COMPELLING REASON TO GRANT REVIEW IN THIS CASE

As already mentioned, there is no conflict among the Circuits on the issue of whether subcontractors are "agents" of the United States under §745. Further, no state court of last resort, indeed, apparently no state court at all, has ever decided the question. Nor has this Court ever addressed the issue. Indeed, in the 45 years since the exclusivity clause was first enacted[2] three, and only three, reported decisions (other than the present case) have ever considered the arcane question of whether §745 applies to subcontractors. Those cases are all at the federal district court level and are all from the same federal district, namely, the Eastern District of Louisiana. *See Walters v. Tidemark Fleet, Inc.*, 847 F.Supp. 464 (E.D.La. 1994); *Bow-*

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[2] The exclusivity clause was adopted in 1950.

man v. Pan American World Services, Inc., 704 F.Supp. 695 (E.D. La. 1989); and *Saffrhan v. Buck Steber, Inc.*, 433 F.Supp. 129 (E.D.La 1977).[3]

Given this extreme paucity of authority, it is apparent that the present case does not involve an issue of burning national significance requiring exercise of this Court's power of supervision. Indeed, if anything, this is a classic case for denying *certiorari* until the lower courts have had a significantly greater opportunity to address the question.

In an attempt to manufacture some special significance for this case, petitioners argue that, unless this Court grants review "federal control over maritime litigation may be lost and the various courts will decide on a case-by-case basis whether subagents of the United States are subject to suit in state court." Petition for *Certiorari*, at p. 7. This argument is specious.

First, this Court need not be concerned about any supposed "loss of federal control" over admiralty matters. State and

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[3] By way of contrast, numerous federal cases have decided whether ship operators (such as MTL), who are in direct privity with the government, are covered by the SAA. *See e.g. Doyle v. Bethlehem Steel Corp.*, 504 F.2d 911 (5th Cir. 1974)(agent engaged to "manage and conduct the business of" the government with respect to navy tankers); *Carter v. American Export Isbrandtsen Lines, Inc.*, 411 F.2d 1185 (2d Cir. 1969)(applying §745 to "general agents" under "General Agency" agreement); *Petition of United States*, 367 F.2d 505, 510 (3d Cir. 1966), *cert. den'd. sub nom. Allen v. Mathiasen's Tanker Industries, Inc.*, 386 U.S. 932, *reh. den'd.*, 386 U.S. 1000 (1967)("contract operator" of government vessels); *Smith v. United States*, 346 F.2d 449 at 453, 454 (4th Cir. 1965), *cert. den'd.*, 382 U.S. 878 (1965) (statute applies to those "having charge of a Govenrment ship" and "actual navigator" of vessel); *Landry v. United States*, 815 F.Supp. 1000 (E.D.Tex. 1993)(plaintiff alleged in his pleadings that the contractor provided the crew which "operated" and was otherwise "in control of" the vessel); *Tarver v. United States*, 785 F.Supp. 607, 611 (S.D.Miss. 1991)("[g]enerally speaking, a contract operator of a government vessel is an agent of the United States for purposes of §745"; *Concepcion v. United States Navy*, 575 F.Supp. 23 (S.D.N.Y. 1983)(§745 precludes recovery against "contract operator" of navy ship).

federal courts have had concurrent jurisdiction over admiralty cases since at least 1789, when Congress first enacted the so-called "Savings to Suitors" clause, 28 U.S.C. §1333(1). Far from being cause for alarm, this shared responsibility of federal and state courts in maritime cases has been part of the fundamental fabric of admiralty jurisprudence in this nation for over 200 years and has served the nation well.

Similarly, the fact that the issue of subcontractor status under §745 will be decided on a "case-by-case basis" is also no cause for concern. That is exactly as it should be—as the Fourth Circuit opinion amply demonstrates, the question of who is and who is not an "agent" of the United States is a peculiarly fact-driven inquiry that necessarily depends on the circumstances of each particular case.[4]

Finally, the hoary specter of legions of conflicting cases that petitioners conjure up has simply not materialized. As already mentioned, in almost half a century only four reported decisions (including the present case) have ever considered the issue, and the present case is the lone appellate decision among those four.

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[4] For example, in the present case, the Fourth Circuit extenisvely reviewed the contracts between the various parties as well as the degree of operational control the United States actually exercised over the petitioners. *Servis,* 54 F.3d at 207-208. Having conducted this review, the Court held that "*[i]n light of these facts*, it is evident that appellees were merely non-agent independent contractors of the United States." *Servis*, 54 F.3d at 208 (emphasis added). The Fourth Circuit's opinion was thus firmly rooted in the specific facts before it. Indeed, given the inherently fact-dependent inquiry involved in determining who is an "agent" of the United States, it can certainly be argued that the present case consists primarily of factual findings or, at best, application of a properly stated rule of law to facts. This is an additional reason for denying review: under this Court's rules, review is "rarely granted" in such cases. *See* Rule 10, Rules of the Supreme Court (". . . A petition for a writ of *certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

In sum, there is nothing special or significant, let alone compelling, about this particular case that makes it stand out from the thousands of other Petitions for *Certiorari* this Court receives every year. Indeed, if anything, this case presents only an "academic" and "episodic" problem that does not merit review. *See Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955). Accordingly, the Petition for *Certiorari* should be denied.

II

THIS COURT SHOULD ALSO DENY REVIEW BECAUSE THE FOURTH CIRCUIT'S OPINION IS CORRECT ON THE MERITS

Quite apart from the lack of any compelling aspect to this case, this Court should also deny the Petition for *Certiorari* because the Fourth Circuit's decision is demonstrably correct. Indeed, this is not even a close case. Both the text and legislative history of §745, as well as the fundamental purposes of the statute, make clear that the act applies only to "general" or "operating" agents of government vessels, such as MTL, who are in direct contractual privity with the United States. None of the petitioners satisfy these criteria.

A. The Text of §745

The exclusivity clause does not appear in a statutory vacuum. A proviso to §745, adopted at the same time as the exclusivity clause, granted a one-time waiver of the statute of limitations for plaintiffs who had mistakenly sued the "agent" of the United States. In that proviso, Congress used the following language to refer to the government's agent:

> any person, partnership, association, or corporation *engaged by* the United States to *manage and conduct the business of* a vessel owned . . . by the United States
>
> . . . .

SAA, §745 (emphasis added). As the Fourth Circuit and other courts have held, the exclusivity clause and this proviso of §745 must be read together. *Servis v. Hiller Systems, Inc.*, 54 F.3d 203, 209 (4th Cir. 1995) (exclusivity clause and limitations waiver "must be read *in pari materia*"; "agent" as used in exclusivity provision is synonymous with one who is "engaged by" the United States "to manage and conduct the business of" a government vessel); *Petition of United States*, 367 F.2d 505, 510 (3rd Cir. 1966), *cert. den'd. sub nom. Allen v. Mathiasen's Tanker Industries, Inc.*, 386 U.S. 932, *reh. den'd.*, 386 U.S. 1000 (1967) (general agency language in exclusivity clause must be read *in pari materia* with the more specific language in second proviso); *Nelsen v. Research Corp. of University of Hawaii*, 752 F.Supp. 350, 356 (D. Haw., 1991) (same).

The relevant inquiry in the present case, therefore, is not merely whether subcontractors and sub-subcontractors, etc., might be considered "agents" of the United States under some abstract and expansive construction of that term. Rather, in accordance with the text of §745 and the cases cited above, the question is whether such entities have been "engaged by" the United States to "manage and conduct the business of" a government vessel.

The answer to this question with respect to each of the petitioners is apparent on the face of the record in this case. First, none of the petitioners was "engaged by" the United States. *i.e.*, MARAD. Norshipco was "engaged by" the private ship's operator, MTL. Hiller was "engaged by" Norshipco and later (separately) by MTL. The Hiller employees were all "engaged by" Hiller. MTL, and *only* MTL, was "engaged by" the United States.

Second, none of the petitioners was engaged to "manage and conduct the business of" the Cape Diamond. Hiller and the Hiller employees were engaged to troubleshoot and repair the CO_2 system, and only the CO_2 system. Norshipco was engaged

to make extensive repairs to the vessel, but not to "manage and conduct the business of" the ship. Once again, MTL, and *only* MTL, was engaged to "manage and conduct the business of" the Cape Diamond under its "Ship Manager's" or "General Agency" Agreement with MARAD.

The very language of §745 thus confirms that the statute was intended to apply only to those (i) in direct contractual privity with ("engaged by") the United States who were (ii) employed as general or operating agents for (to "manage and conduct the business of") government vessels. None of the petitioners meets either of these criteria.

B. Legislative History

A review of the legislative history of the 1950 amendment to §745, and the cases that led to its enactment, confirm that the term "agent" was intended to apply to, and *only* to, general or operating agents of government vessels. Thus, the legislative history makes clear that the statute was intended to be declaratory of existing law[5] and "not [to] change existing law whatsoever."[6] The existing law the statute sought to declare consisted of five Supreme Court cases[7] which are explicitly recited in its

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[5] S. Rep. No. 1782, 81st Cong., 2d Sess. (1950) *partially reprinted in* 1951 A.M.C. 148 ("S.Rpt. 1782"), pp. 1-2 (the bill "merely restates expressly the law presently established by the courts"); S. Rep. No. 2535, 81st Cong., 2d Sess. (1950) *partially reprinted in* 1950 U.S.C.C.A.N. 4209 ("S. Rpt. 2535"), p. 2 (the bill "declares in express statutory terms the existing law as established by the decisions of the courts").

[6] Remarks of Senator Magnuson, floor manager for the bill, 96 Cong. Rec., pt. 12, S16115.

[7] *See United States Shipping Bd. Emerg. Fleet Corp. v. Lustgarten*, 280 U.S. 320, 325 (1930), *overruled on other grounds, Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 578 (1943); *Hust v. Moore-McCormack Lines, Inc.*, 328 U.S. 707 (1946), *overruled, Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783, 794 (1949); *Caldarola v. Eckert*, 332 U.S. 155 (1947).

legislative history.[8] *All* of those cases involved only general or operating agents of the government. Not one of the cases in the line extending from 1930 (*Lustgarten*) through 1949 (*McAllister*) involved a suit against a subcontractor, or an employee of a subcontractor, of a ship's general agent.

Because the cases which preceded, and provided the impetus for, the enactment of §745 involved *only* ship's operators, the Committee reports and floor debates are full of references to such "operating" and "general" agents. For example, the remarks by the bill managers on the House and Senate floors were unequivocal that the types of agents to whom the statute applied were "general agents" and "ship operators".[9] Likewise, the House and Senate Reports consistently speak of "ship masters," "shipping organizations," "private companies who operate Government-owned vessels" and "operators of vessels."[10] While the various Committee Reports and floor comments are replete with references to "general" and "operating" agents, never once do they refer to ship repairers, subcontractors, sub-subcontractors, *etc.* In light of the cases that led up to §745's enactment, that is hardly surprising.

In addition, the legislative history states very explicitly that the bill was *not* intended to affect seamen's rights against anyone other than operating agents. S. Rpt. 1782, p. 1. Thus, existing rights of seamen were to be preserved with respect to operating agents. *Id.* Moreover, and more importantly for present purposes, existing remedies "against other parties" were also not to be affected by the amendment. *Id.* Since none of the cases preceding the 1950 amendment purported to prevent a seaman

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[8] *See generally* H. Rep. No. 1292, 81st Cong., 1st Sess. (1949) ("H. Rpt. 1292"); S. Rpt. 1782; S. Rpt. 2535.

[9] 95 Cong. Rec., pt. 9, H12098 (Rep. Hobbs: "general agents"); 96 Cong. Rec., pt. 12, S16115 (Senator Magnuson: "ship operators").

[10] H. Rpt. 1292, pp. 2-5; S. Rpt. 1782, pp. 1-2; S. Rpt. 2535, pp. 1-3.

or anyone else from suing a contractor or a subcontractor of an operating agent, the only logical conclusion is that the statute preserved the seaman's rights under existing law to bring such suits.

It should also be noted that all of the references in the Committee Reports and floor debates require an "engagement" by the United States of the agent in question, *i.e.* privity of contract. There is nothing to suggest any intent that the immunity which arises from engagements by the United States extends beyond those in direct contractual privity with the United States to those hired by operating agents as contractors, subcontractors or sub-subcontractors. Indeed, the litigation history and uncertainty which produced the 1950 amendment, as well as the Committee Reports and floor debates, all suggest that the legislation was limited in scope only to instances where the United States was in direct privity with its operating agent.

Finally, as the Court of Appeals significantly noted, "because the SAA waives the government's sovereign immunity that statute must be strictly construed in favor of the United States." *Servis*, 54 F.3d at 209, *citing McMahon v. United States*, 342 U.S. 25, 27, 72 S.Ct. 17, 19, 96 L.Ed 26 (1951). Although Congress could have made the United States liable for the actions of the agent's contractors, subcontractors, *etc.*, when it amended §745 if it had chosen to do so, unfortunately for petitioners, it did not. If Congress had intended the radical departure from existing law that would have been entailed by making the United States liable for the torts of subcontractors, sub-subcontractors, *etc.*, it would have explicitly said so in the statutory text. In addition, the Committee reports and floor debates would have been full of references to this new, and vastly expanded, government exposure. Instead, the statute uses the term "agent" and then clarifies that that means one "engaged by the United States to manage and conduct the business of" a federal ship. In addition, the congressional reports and floor

debates confirm over and over that the reach of the statute was narrow. It codified existing law, disclaimed explicitly any intent to diminish existing rights, and stated repeatedly that the statute applied *only* to general or operating agents of government vessels.

It is simply inconceivable that by using the term "agent" Congress intended vastly to broaden the scope of its liability to include those with whom it had no contract, and over whom it exercised no control.[11] Indeed, as the Court of Appeals correctly noted, making the United States liable for the torts of contractors, subcontractors, *etc.*: "raises the specter of governmental liability for every act of negligence by a painter or plumber engaged to perform some limited task aboard a United States vessel, regardless of that party's contractual relationship with the government." *Servis*, 54 F.3d at 209. This could have severe consequences for the federal treasury, a result which no court should infer in the absence of unambiguous statutory language and explicit congressional intent.

CONCLUSION

In conclusion, this case presents a mundane, if somewhat arcane, question of admiralty law. The issue has been the subject of only four reported decisions (including the opinion below) in almost half a century. Further, the Fourth Circuit's decision does not conflict with the decision of any other United States Court of Appeals, any state courts, or any decision of this Court. Neither is there anything special or unusual about this case that creates a "compelling" reason to grant review.

In addition, the opinion below is correct. By casting themselves as "agents" under §745, petitioners are attempting to

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[11] *Compare* for example, the Federal Torts Claims Act which limits the government's exposure to torts committed by government "employees." 28 U.S.C. §§2671 and 2672. This does not even include contractors with whom the government is in direct privity. 28 U.S.C. §2671.

benefit from a statute that was never intended for their protection. The text, legislative history and judicial construction of that provision all point in the same direction — only general or operating agents of government vessels are covered by the act.

For these reasons, the Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

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